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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

JAMES BARRETT and HARRY F. OLSON,

Petitioners,

versus

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

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QUESTION PRESENTED

I.

Is Section 16-15-260, 1976 Code of Laws of South Carolina, as amended, constitutional on its face and as applied to Petitioners in that it complies with the guidelines set forth in Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) and does it violate the First, Sixth and Fourteenth Amendments of the United States Constitution?

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21722, filed June 8, 1982, as reproduced in Petitioners' Appendix A.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

Is Section 16-15-260, 1976 Code of Laws of South Carolina, as amended, constitutional on its face and as applied to Petitioners in that it complies with the guidelines set forth in Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) and does it violate the First, Sixth and Fourteenth Amendments of the United States Constitution?

ARGUMENT

Section 16-15-260, 1976 Code of Laws of South Carolina, as amended, is constitutional on its face and as applied to Petitioners in that it complies with the guidelines set forth in Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S.Ct. 2607 (1973) and does not violate the First, Sixth and Fourteenth Amendments of the United States Constitution.

Petitioners were convicted of distributing obscene materials pursuant to §16-15-260, et seq., 1976 Code of Laws of South Carolina, as amended. By exceptions and at brief on appeal, Petitioners specifically claim that §16-15-260, 1976 Code of Laws of South Carolina, as amended, is unconstitutional, contending that subsections (b) and (c) of this statute exceed the standards set forth in Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) and are violative of Petitioners' First, Sixth and Fourteenth Amendment rights as guaranteed by the United States Constitution. Petitioners contend that the remainder of §16-15-260 is constitutionally unobjectionable. Respondent respectfully submits that the statute in its entirety is constitutionally sound and that Petitioners' claims and contentions are without merit.

As Petitioners note, Miller v. California, supra, provides guidelines which must be used to identify obscene material so that a State may regulate obscenity without infringing upon the First Amendment as applicable to the States through the Fourteenth Amendment. In order for any work to be declared obscene, it must be determined (1) that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest, (2) that the conduct described or depicted in the work is "patently offensive" as specifically defined by State law and, (3) that the work, taken as a whole, lacks serious social value. Miller also reaffirmed the Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957), reh. denied, 355 U.S. 852, decision that obscene material is not protected by the First Amendment; abandoned

the Memoirs v. Massachusetts, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1976) "utterly without redeeming social value" test for obscenity' and redefined the Roth community standard to specify that obscenity shall be determined by applying contemporary community standards rather than a national community standard.

Along with the holdings set forth in Miller, this Court also provided examples of what a state statute could define for regulation under the guidelines of the opinion. Petitioners appear to contend that, because §16-15-260 is not a carbon copy of the Miller, examples, the statute is unconstitutional. However, when providing the above-mentioned examples, this Court specifically cautioned:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. 37 L. Ed. 2d 419, 431.

This caveat was reiterated in the later case

of Hamling v. United States, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974).

> The Miller cases, important as they were in enunciating a constitutional test for obscenity...were intended neither as legislative drafting handbooks nor as manuals for jury instruction. 41 L. Ed. 2d 590, 619.

In light of this, Respondent asserts that the inclusion of subsections (b) and (c) in §16-15-270 does not render the statute unconstitutional. Although neither subsection is specifically included in the Miller opinion, each subsection is within the constitutional guidelines set forth in that opinion.

Section 16-15-260 (b), 1976 Code of Laws of South Carolina, as amended, reads as follows:

> (b) 'Prurient interest' means a shameful or morbid interest in nudity, sex or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts.

Petitioners object solely to the portion of §16-15-260 (b) which defines "prurient

interest" as "reflective of an arousal of lewd and lacivious desires and thoughts," conceding that the remainder of the definition complies with Miller. Respondent respectfully submits that the allegedly objectionable portion is a valid definition of the term "prurient interest." Webster's New International Dictionary (Unabridged, 2d Edition, 1949) defines prurient as "uneasy with desire or longing; lascivious desire or thought." (emphasis added) The American Heritage Dictionary (New College Edition, 1978) also defines prurient as "obsessively interested in improper matters, especially of a sexual nature; arousing or appealing to such an interest." And, Black's Law Dictionary (5th Edition, 1979) defines prurient interest as "[a] shameful or morbid interest in nudity, sex, or excretion... 'prurient' means having lustful ideas or desires...an obsessive interest in immoral

and lascivious matters." (emphasis added). It is therefore obvious that the definition of prurient interest set forth in §16-15-260 (b) is a standard definition. Furthermore, Roth v. United States, supra, defines prurient interest as material tending to excite lustful thoughts. Because the Miller decision neither rejects this definition nor redefines prurient interest, Respondent submits that the Roth definition is constitutionally sound. Respondent therefore asserts that §16-15-260 (b) provides a constitutionally sound and linguistically correct definition of the term prurient interest.

If, as Petitioners contend, §16-15-260 (b) adds to the definition of prurient interest provided in Miller, Respondent submits that the additional language narrows rather than broadens the standards necessary to prove a work is obscene. The subsection

in question requires that the prosecution show that a work produces a morbid interest and reflects lewd thoughts in order to have a work declared obscene. This requirement increases the prosecutorial burden and produces a standard which is more stringent than the Miller standard. This Court has specifically held that, where a statute imposes a greater burden on the prosecution than does Miller, there is no constitutional violation. See Hamling v. United States, supra; Ward v. Illinois, 431 U.S. 767, 52 L. Ed. 2d 738, 97 S. Ct. 2085 (1977). Since Miller permits the imposition of a lesser burden on the prosecution than does §16-15-260 (b), Petitioners would derive no benefit from the use of the Miller standard and suffers no constitutional prejudice from the application of the current South Carolina statute.

Respondent also objects to §16-15-260 (c) which provides as follows:

> (c) 'patently offensive' means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

Petitioners allege that this subsection is unconstitutional because it substitutes community standards of decency for community standards of tolerance, citing Red Bluff Drive In, Inc. v. Vance, 648 F. 2d 1020 (5th Cir. 1981), reh. denied, 656 F. 2d 700 and Smith v. United States, 431 U.S. 291, 52 L. Ed. 2d 324, 97 S. Ct. 1756 (1977) as support.

In Red Bluff, the Fifth Circuit Court of Appeals refused to declare a similar Texas statute was unconstitutional finding that

> [w]hether Texas has exceeded its constitutional authority to regulate obscenity by defining "patently offensive" in terms of "decency" rather than "tolerance" is a significant question. But before the constitutional issue can be resolved, the interpretation

> of the critical word must be left to the State courts.... If on its face the statute warned too broadly, deference to the State courts would be inappropriate. Such is not the case here. There is ample room to formulate jury instructions that comport with...the First Amendment rights of defendant charged with obscenity offenses. (emphasis added). 648 F. 2d 1020, 1029.

In finding that jury instructions can make a somewhat broad statutory definition constitutionally sound, Red Bluff followed the direction of this Court in the post Miller decision in Smith v. United States, supra, which found as follows:

> Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in the community does not mean...that obscenity convictions will be virtually unreviewable... [J]uries must be instructed so that they consider the entire community and not simply their own subjective reactions. 52 L. Ed. 2d 324, 338.

Respondent submits that, like the Red Bluff statute, §16-15-260 (§16-15-260 (c)

specifically) is not on its face so broad that it is without a doubt unconstitutional. Respondent further submits that any problems with the statute were corrected by the trial court's instructions to the jury. During charges to the jury the trial court instructed on this issue on several occasions. These instructions clearly indicate that the jury was advised to use the average man community standard set forth in Miller.

Petitioners further contend that §16-15-300 is unconstitutional, claiming that it presumes intent as against defendant:

> (a) A person who possesses two or more copies of identical obscene material or ten or more copies of similar obscene material is presumed to possess them with intent to distribute them and (b) a person who manufactures, prepares, publishes or prints an obscene material in two or more copies is presumed to do so that the material shall be made available to the public.

Respondent submits §16-15-300 does not presume criminal intent. Nor does it presume a work to be obscene. The statute merely declares that, if a work is found to be obscene and the defendant has two or more copies of that identical work, he is presumed to be a distributor. The trial court clearly instructed the jury that the prosecution must prove guilt.

Respondent respectfully submits that the above arguments negate Petitioners' complaints against the obscenity statutes of our State. These statutes are constitutionally sound and in compliance with the Miller guidelines. Respondent therefore requests that this Court declare these statutes constitutional and affirm the convictions of Petitioners.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT.